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No. 89-1213

# In The
# SUPREME COURT OF THE UNITED STATES
## October Term, 1989

CINEMA BLUE OF CHARLOTTE, INC.,
JIM ST. JOHN, CURTIS RENEE PETERSON,

Petitioners,

vs.

PETER S. GILCHRIST III, DISTRICT
ATTORNEY OF THE 26TH PROSECUTORIAL
DISTRICT, IN HIS OFFICIAL CAPACITY,

Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

On December 5, 1989, prior to arguments on pre-trial motions in the criminal obscenity prosecution of Petitioners in North Carolina Superior Court, Petitioners' (hereafter Cinema Blue) first approached and requested Respondent (hereafter Gilchrist) either to assure them that their proposed expert would not be prosecuted if he exhibited charged materials to large "focus groups" of local citizens or to grant immunity from prosecution. Gilchrist did neither.

At no time did Gilchrist "threaten" prosecution, despite Cinema Blue's repeated assertions that the prosecutor's refusal to offer premature assurances of non-prosecution constituted "threats." Instead, Gilchrist merely refused to guarantee to forbear prosecution and suggested that Cinema Blue take their request to the trial court.

Cinema Blue then moved the Superior Court of North Carolina in Mecklenburg County, Judge Marvin Gray, presiding, for a protective order to prevent the experts' prosecution in the event they

conducted large "focus group" exhibitions and the twelve indicted materials were determined to be obscene. Gilchrist then expressed his opinion in state court that, based upon the postulate before the court of mass public exhibitions of the twelve indicted materials, that such exhibitions would contravene the North Carolina obscene exhibitions law (N.C.G.S. 14-190.1). In fact, the twelve items included five materials previously adjudicated to be obscene. Cinema Blue's request was denied by Judge Gray after a full hearing.

At the hearing before Judge Gray, Gilchrist told the state court that he would not object to providing the materials to Cinema Blue's expert witnesses for their private use in preparing expert testimony. (4th Cir. J.A. 25-a) Nevertheless, after denial of the protective order by the state court, Cinema Blue requested the Federal District Court to enter a preliminary injunction against any State official from interfering with the showing of the indicted items by Cinema Blue or its primary expert, one Dr. Scott.

Federal District Judge James B. McMillan scheduled a hearing on Cinema Blue's motion and Gilchrist was called by Cinema Blue to testify. Judge McMillan asked Gilchrist if Cinema Blue's apprehensions about being prosecuted should Dr. Scott show the twelve pleaded materials were reasonable and Gilchrist testified that they were. After Gilchrist left the witness stand, Cinema Blue admitted that five of the twelve materials were obscene and deleted them from their federal complaint. (4th Cir. J.A. 75-a) The abbreviated list was never presented to state court or Gilchrist.

Cinema Blue did not present any evidence to the Court that showed any prosecutorial bad faith or invidious patterns of discriminatory enforcement. Evidence indicated that an unprosecuted showing of some explicit sexual material (none of which were identical to the items charged against Cinema Blue) occurred in the Criminal Justice curriculum at the University of North Carolina at Charlotte prior to the effective date of the new, strengthened North Carolina obscenity law in October, 1985. Yet, evidence indicated that most, if not all, such material was not as explicit as the items involved in this case. (4th Cir. J.A. 97-99a) There was no evidence of any complaints to Gilchrist nor any evidence that the material violated the law as it then existed.

There was also evidence of another unprosecuted showing of even less explicit material to a civic group opposed to obscenity that occurred after the passage of the new law. Yet, the testimony of Cinema Blue's witnesses indicated that no known complaints were

made and, since it simply consisted of nude photographs, the material was probably not obscene under the new law. (4th Cir. J.A. 66-a and 69-a) Judge McMillan nevertheless entered his Order granting the preliminary injunction.

Despite the fact that Mr. Gilchrist's above-noted statement concerning the lawfulness of providing the materials to the expert for their use in preparing testimony was pointed out to Judge McMillan, the Judge nevertheless held in his Order that "(w)ithout the injunction, plaintiffs will stand trial in state court without being able to offer expert testimony in their defense." (Pet. App. 8) This clear error, among others, was pointed out by Gilchrist to the Fourth Circuit, which reversed the District Court and ordered it to abstain.

The Opinion of the Fourth Circuit (Pet. App. 17) notes that this "dispute is essentially one over the way in which the appellees (Cinema Blue) intended to lay the foundation for the expert's testimony." Cinema Blue (Pet. 4-5) maintains that the methodology chosen resulted from "concern as to admissibility of (public opinion surveys) . . . due to a recent line of appellate decisions calling into question, and, in fact, disapproving of certain definitions and descriptions [of allegedly obscene materials] used in various sociological studies."

In Petitioner's Statement of the Case, Cinema Blue notes, in particular, ***State v. Anderson***, 322 N.C. 22, 32-34, 366 S.E.2d 459, 466, *cert. denied*, 109 S.Ct. 513 (1988) ["Dr. Scott's study does not appear in any way to have focused on whether the average adult applying contemporary standards would find magazines limited exclusively to pictorial portrayals of actual acts of 'vaginal, anal or oral intercourse' to be patently offensive. . . At best his study could be said to have focused on the availability of a very broad range of sexually oriented materials . . ." (emphasis added)], and ***United States v. Pryba***, 678 F.Supp. 1225, 1229 (E.D. Va. 1988), ["To be admissible . . . a public opinion poll must be relevant; it must ask questions concerning the materials involved in the case or words that are 'clearly akin' to the charged materials. (citations omitted) . . . The court has viewed all of these materials and is confident that the descriptive language fails to convey the impact of the visual image. For example . . . (t)here are no terms in the definition which inform the respondent that he or she is being questioned about materials which show, *inter alia*, (i) women's breasts and men's genitals in tourniquet devices; . . (iii) insertion of a large pipe into a woman's anus; . . . and (v) a nude woman's breasts being repeatedly jabbed and punctured by pins while she hangs in chains." (emphasis added)].

## SUMMARY OF ARGUMENT

Pointing up the salience of the Fourth Circuit's comment that "the dispute is essentially one over the way in which the appellees intended to lay the foundation for the expert's testimony," is the fact that neither the ***Anderson*** nor the ***Pryba*** case requires the actual materials charged to be publicly exhibited in order for surveys based upon accurate and complete descriptions to be "validated" for admissibility. Implicit in the decisions of both courts is the ability of the trial judge to determine whether the experts' descriptions of the charged materials "convey the impact of the visual image." (***Pryba*** at 1229) Given this limited requirement, it becomes clear that the dispute is really over whether otherwise criminal conduct may be immunized simply because its motive is to prepare a defense to pending criminal charges. Such a promise of immunity is what was being requested of Gilchrist.

It would have been improper for the prosecutor to offer such premature assurances, based upon limited facts, prior to the postulated conduct, and without benefit of investigation of the ultimate events to fully inform prosecutorial discretion. Gilchrist's discretion, honesty, and propriety are pointed up by his response to the question on reasonable apprehension from the federal judge. It would not be unreasonable for any person to be apprehensive of violating a valid state law, such as by publicly exhibiting materials previously found to be obscene under an unchallenged state obscene exhibitions law.

There is nothing novel about the doctrine of federal abstention, nor about the way in which the Fourth Circuit applied it. It is clear that the District Court should have abstained from entertaining this action. This litigation was clearly an attempt by Cinema Blue to utilize §1983 to effect a direct, interlocutory appeal from the trial courts of the State of North Carolina to a federal district court. "[L]ower federal courts possess no power whatever to sit in direct review of state court decisions." ***Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers***, 398 U.S. 281 (1970). This was recognized by the Fourth Circuit in its Opinion. (Pet. App. 25) The editor of the annotation to ***Perez v. Ledesma***, 401 U.S. 82 (1971), appearing at 27 L.Ed.2d 988, 991 aptly summarized existing law:

> The effect of ***Younger v. Harris*** and its companion cases . . . might best be summed up by Mr. Justice Stewart, who in his concurring opinion [in ***Younger***] declared the Supreme Court's holding to be that a federal court must not, save in exceptional and extremely limited circumstances, intervene by way of

> either injunction or declaration in an existing state criminal prosecution, and that such circumstances exist only when there is a threat of irreparable injury, both great and immediate. The Justice pointed out that a threat of this nature might be shown if the state criminal statute in question were patently and flagrantly unconstitutional on its face, or if there had been bad faith and harassment - official lawlessness - in a statute's enforcement. . . . (emphasis added)

Cinema Blue did not even allege the unconstitutionality of the underlying statute and, as noted by the Fourth Circuit, there is no evidence of prosecutorial bad faith or harassment. (Pet. App. 27) Further, the protection sought by Cinema Blue was based upon no previously recognized constitutional right. No person is, nor ought to be, immune from criminal prosecution for his alleged criminal acts. Such requested immunity is not a ground for equity relief since the lawfulness of the basis for a state court prosecution may be determined as readily in a criminal case as in a suit for an injunction. ***Stefanelli v. Minard***, 342 U.S. 117 (1951), and ***Grove Press, Inc. v. Evans***, 312 F. Supp. 614 (E.D.Va. 1970).

## ARGUMENT

### I.

### THE FOURTH CIRCUIT COURT OF APPEALS DECISION REQUIRING ABSTENTION IS NOT IN DIRECT CONFLICT, BUT RATHER IS IN HARMONY WITH THE APPLICABLE DECISIONS OF THIS COURT.

#### A. THERE ARE CIRCUMSTANCES IN WHICH ABSTENTION IS APPLICABLE SHORT OF AN OUTRIGHT INJUNCTION AGAINST AN ONGOING CRIMINAL PROSECUTION, AND THIS CASE PRESENTS SUCH A CIRCUMSTANCE.

Federal District Judge McMillan, who entered the initial order imposing a preliminary injunction, indicated that his "initial reaction to the complaint was to abstain." (Pet. App. 6) This initial reaction occurred despite Judge McMillan's disapproval of abstention. In the District Court's Memorandum of Opinion supporting the grant of preliminary injunction (Pet. App. 6), Judge McMillan cites to his own article, McMillan, ***Abstention--The Judiciary's Self-Inflicted Wound***, 56 N.C.L.Rev. 527, 541 (1978). In that article he states that,

"[a]bstention . . . is . . . confusing, unrealistic and frustrating. . . . The theoretical concerns of federalism are once more paramount over the rights of man." Yet, as McMillan himself states in the cited article (at 542): "Normally, a previously pending criminal prosecution, plus certiorari, does provide a forum to assert constitutional claims." (Emphasis in original)

Nevertheless, with Judge McMillan's strongly stated disapproval of abstention as a backdrop, the District Court relied upon ***Doran v. Salem Inn, Inc***, 422 U.S. 922 (1975) in its decision not to abstain. (Pet. App. 6) Cinema Blue also relies on ***Doran*** (Pet. 9-10) and a line of similar cases on "threatened future prosecutions" as the basis for their claim that the decision of the Fourth Circuit is in conflict with applicable decisions of this court.

Yet, ***Doran*** does not stand for the simple proposition that future prosecutions escape the abstention doctrine. The facts of the ***Doran*** case were determinative, presented a narrow exception to abstention, and were entirely different from the instant case. ***Doran*** involved a provision of law challenged as unconstitutional on its face (not present here) and involved parties not directly allied to the defendants in a pending state criminal action. In this case Cinema Blue were the defendants in the State criminal trial for which preparation was being made. The very remedy sought in federal District Court had been sought and denied in the State Superior Court in the pending criminal action. That denial was appealable by the express provisions of N.C.G.S. 15A-1442 and N.C.G.S. 15A-1443. (Pet. App. 35)

Although the court in ***Doran*** chose not to abstain "on the facts of this (***Doran***) case," (emphasis added) the court nevertheless indicated that the question of whether injunctions of future prosecutions are governed by abstention principles had been reserved by ***Younger v. Harris***, 401 U.S. 37 (1971) and its progeny. The court in ***Doran*** (at 928) continued to reserve the question for future cases when it indicated that "there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the ***Younger*** considerations which govern any one of them. . . " The ***Doran*** court also quoted ***Samuels v. Mackell***, 401 U.S. 66, 73 (1971), which said that "[o]rdinarily . . . the practical effect of [injunctive and declaratory] relief will be virtually identical. . . "

In fact, the Court in ***Doran*** indicated that a federal court may not intervene by way of an injunction in a pending state criminal prosecution, in the absence of exceptional circumstances creating a threat of irreparable injury (422 U.S. at 930-931). Even the exceptional

circumstance in ***Doran*** that the challenged ordinance ". . . would prohibit the performance of the 'Ballet Africains and a number of other works of unquestionable artistic and socially redeeming significance" did not result in the Court allowing an injunction against a pending trial and was noted as the key factor even for allowing the exceptional injunction against future enforcement of the ordinance as to the parties not yet charged. ***Salem Inn, Inc. v. Frank***, 364 F. Supp. 478, 483 (1973). Further, the Court in ***Doran*** took pains to note:

> It is recognized, however, that a district court must weigh carefully the interests on both sides. Although only temporary, the injunction does prohibit state and local enforcement activities against the federal plaintiff pending final resolution of his case in the federal court. Such a result seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of ***Younger***.
>
> ***Doran v. Salem Inn, Inc.***, 422 US 922, 931 (1975).

This impairment of the state's interest in enforcing its criminal laws was conceded in the District Court's Memorandum of Opinion (Pet. App. 9), and is the reason why exceptions to the ***Younger*** policy of abstention have been very narrowly construed.

Each of the issues raised in the District Court could have been [and were] presented to the state tribunal. See ***United Books, Inc. v. Conte***, 739 F.2d 30 (lst Cir. 1984). Were the preliminary injunction below sustained, the federal courts would become a forum to determine probable cause to try any plaintiff in state court using the Civil Rights Act as a pretext for jurisdiction. As pointed out in the landmark case of ***Stefanelli v. Minard,*** 342 U.S. 117 (1951), to sanction such federal court intervention would be to expose every state criminal prosecution to insupportable disruption, since every question of procedural due process would invite a flanking movement against the system of state courts by resort to the federal forum. Such asserted unconstitutionality would provide ready opportunity which conscientious counsel might be bound to employ to subvert the orderly, effective prosecution of local crime in local courts. The court concluded that to suggest these difficulties is to recognize their solution. The court stated (at 122-123):

> (C)ourts of equity in the exercise of their discretionary powers should conform to this policy [abstention] by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; . . . If these considerations limit federal courts in retraining State prosecutions merely threatened, how much more cogent are they to prevent federal interference with proceedings once begun. If the federal equity power must refrain from staying State prosecutions outright to try the central question of the validity of the statute on which the prosecution is based, how much more reluctant must it be to intervene piecemeal to try collateral issues? (emphasis added)

B.

## *YOUNGER* ABSTENTION PRINCIPLES ARE APPLICABLE TO THE CASE AT BAR AND THE FOURTH CIRCUIT PROPERLY ORDERED THE DISTRICT COURT TO ABSTAIN IN THE ABSENCE OF PROSECUTORIAL BAD FAITH OR A CLEAR CONSTITUTIONAL VIOLATION.

Absent a sufficient showing of bad-faith harassment, invidious discrimination, or a challenge to the facial validity of the underlying statute, it can hardly be maintained that the requisites for preliminary injunction were met. As the District Court noted (at Pet. App. 7), the appropriate standard in the Fourth Circuit for interlocutory injunctive relief is a balance of hardship test, which turns upon the flexible interplay of four factors: probable irreparable harm to plaintiff without injunction, harm to defendant if injunction issues, likelihood of plaintiff's prevailing on the merits, and public interest. ***Blackwelder Furniture Co., Inc. v. Seilig Mfg. Co., Inc.***, 550 F.2d 189 (4th Cir. 1977); ***Joyner v. Lancaster***, 553 F. Supp. 809 (M.D.N.C. 1982)

Again, Cinema Blue did not allege the unconstitutionality of the underlying statute, and since even the seven materials not yet adjudicated to be obscene were the subject of indictments by the Mecklenburg County Grand Jury, it can hardly be maintained that the requisite for bad-faith harassment is present, i.e., absence of any reasonable likelihood of success in the prosecution. Nor is there any evidence of a pattern of invidious discrimination.

Cinema Blue further argues that the injunction against Gilchrist did not directly interfere with the pending state prosecution. Yet, the state Superior Court judge was well aware of the actions of both federal courts and inquired of the Attorney General of North Carolina as to their import prior to the criminal trial. As the Fourth Circuit noted (Pet. App. 24):

> (W)e cannot see how there could be any constitutionally protected right to obtain evidence for use in a pending state proceeding unless its use for that purpose were also thought to be constitutionally protected. . . . (N)ecessarily implicit in any such decree must be a judicial perception that the reason its procurement is constitutionally protected is because, more fundamentally, its use is. . . . Equity is no more properly invoked and exercised for vain, or potentially vain, endeavors in constitutional than other matters.

As stated in *Perez v. Ledesma*, 401 U.S. at 121:

> The pending state proceeding ordinarily provides an existent, concrete opportunity to secure vindication of constitutional claims in the state courts, with ultimate review by this Court. In this situation collateral resort to a federal court will not speed up the resolution of the controversy since that will not come to an end in any event until the state litigation is concluded. Moreover, federal intervention may disrupt the state proceeding through the issuance of necessary stays or the burdensome necessity for the parties to proceed in two courts simultaneously. Federal adjudication of the matters at issue in the state proceeding may otherwise be an unwarranted and unseemly duplication of the State's own adjudicative process.

This is exactly what has happened in the instant action. The appeals of the criminal convictions of Cinema Blue are pending in the North Carolina Court of Appeals, and the asserted constitutional requirement for the admissibility of public opinion surveys is the primary issue there. As predicted by *Perez*, there has also been much that is unseemly in the taxing and sometimes exasperating necessity of proceeding simultaneously in two forums. This can be seen in the

claim of Cinema Blue to the Fourth Circuit that Gilchrist's appeal was pursued in such a manner as to interfere with Cinema Blue's criminal trial preparation, even though Cinema Blue was the federal plaintiff. This confusion of process can also be seen in the bootstrapping argument of Cinema Blue (Pet. 19-20) to this Court that, since a sufficient number of "focus group" showings were made during the pendency of the preliminary injunction to allow Cinema Blue to make a colorable proffer of expert testimony at the criminal trial, the resulting absence of prejudice from the state court's denial of the motion for a protective order is now unreviewable. Even were this to eliminate on appeal the essence of Cinema Blue's novel Sixth Amendment claim (which it does not), it certainly would have been possible to fully assign error to the state court's denial of the protective order had the District Court properly abstained in the first instance.

Nor is it required by any case cited to this Court that public exhibitions of the charged materials be held in order to validate sufficiently detailed descriptions of the charged materials to allow for the preparation of a potentially admissible proffer of expert testimony. Gilchrist did not object to making the materials available for the use of defense experts.

Thus, there is no probable irreparable harm to Cinema Blue. Even the proffer made in state criminal court based upon the showings that were held during the pendency of the injunction were ruled inadmissible as more prejudicial than probative. This ruling is the heart of the primary assignment of error in the state criminal appeal. There is no substantial likelihood of success on the merits. The constitutional claims are novel and unrecognized. There was no evidence of bad faith or invidious discrimination. Yet, there was conceded injury to the state through impairment of its ability to enforce its criminal laws, and there was injury to the public interest. The films screened to the public, by Cinema Blue's own admission, would not have been exhibited absent the erroneous injunction, and two were later found to be criminal obscenity by a state petit jury.

## II.

## THE SIXTH AMENDMENT DOES NOT IMMUNIZE OTHERWISE CRIMINAL CONDUCT SIMPLY BECAUSE ITS PURPOSE IS THE DEVELOPMENT OF EVIDENCE FOR THE DEFENSE OF CRIMINAL CHARGES.

### A.

### PUBLIC EXHIBITIONS OF MATERIALS ALLEGED TO BE OBSCENE ARE NOT THE ONLY MEANS OF CONDUCTING PUBLIC OPINION STUDIES FOR USE IN THE DEFENSE OF CRIMINAL OBSCENITY CHARGES AND ARE NOT PROTECTED OR COMPELLED BY THE FIRST, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Cinema Blue (Pet. 21) refers to the confrontation and compulsory process clauses of the the Sixth Amendment and cites several cases in an attempt to justify the claim of a novel Sixth Amendment immunity for public exhibitions of allegedly obscene material in order to lay the foundation for admissible public opinion surveys in defense of obscenity charges. Is not Cinema Blue unavoidably suggesting, in addition to the existence of an immunity, the ultimate right of a defendant accused of dissemination of obscenity to compulsory process for the attendance of the public at exhibitions of the charged materials? Is this right not the logical next step after the establishment of such an immunity? Would this not be the ultimate invasion of the province of the jury and the ultimate unnecessary subjugation of a longsuffering public to a repetition of criminal conduct?

Neither this Court, nor any other court of which Gilchrist is aware, or which Cinema Blue has cited, has ever held the existence of either type of Sixth Amendment immunity and/or right. The right that Cinema Blue asserts (Pet. 23) from ***Kaplan v. California***, 413 U.S. 115, 121 (1973) and ***Smith v. California***, 361 U.S. 147, 164-165 (1959) is merely "to enlighten the judgment of the tribunal . . . regarding the prevailing literary and moral community standards and to do so through qualified experts."

The type of immunized and (if constitutionally required) compelled public exhibitions urged upon the Court by Cinema Blue are not unavoidable and are not the *sine qua non* for a fair trial. As noted in ***Sedelbauer v. State***, 455 N.E.2d 1159, 1165 (Ind. App. 3 Dist.1983):

> While the United States Supreme Court has recognized that expert opinion may be used to define contemporary community standards, it has never required such in obscenity cases.... The trial court's refus[al] to admit any testimony on community standards... [did] not amount to a denial of due process."

Indeed, this Court has noted that "the subject of obscenity does not lend itself to the traditional use of expert testimony because such testimony is usually admitted only to explain to jurors what they otherwise would not understand." See ***Paris Adult Theater I v. Slaton***, 413 U.S. 49, 56 (1973). As stated in ***Paris Adult,*** "no such assistance is needed by jurors in obscenity cases." In ***Hamling v. United States***, 418 U.S. 87, 108 (1974), the court noted that in obscenity trials the trial court retains "wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." So, ***Kaplan*** stands for no more than the proposition that expert testimony is not *per se* inadmissible in obscenity trials, and if competent, relevant, and appropriate, should be admitted to "enlighten the judgment of the tribunal."

Cinema Blue Petitioners base their assertion of the need for large exhibitions of the pornographic materials upon the decision in ***United States v. Pryba***, 678 F. Supp. 1225 (E.D. Va. 1988) and upon the decision of the North Carolina Supreme Court in ***State v. Anderson***, 322 N.C. 22, 366 S.E.2d 459, *cert. denied*, 109 S.Ct. 513 (1988). Yet, neither court required the validation of relevant polling questions by the actual showing of the charged materials. ***Anderson*** actually notes the proper admission of expert testimony without the type of predicate mass exhibition prayed for by Cinema Blue in this action.

***Anderson*** sustained the inadmissibility of certain polling surveys because (at 32), "Dr. Scott's study does not appear in any way to have focused on whether the average adult applying contemporary standards would find magazines limited exclusively to pictorial portrayals of actual acts of 'vaginal, anal or oral intercourse' to be patently offensive.... At best his study could be said to have focused on the availability of a very broad range of sexually oriented materials..." (emphasis added).

Similarly, ***Pryba*** (at 1229) merely held that "(T)o be admissible . . . a public opinion poll must be relevant; it must ask questions concerning the materials involved in the case or words that are 'clearly akin' to the charged materials. (citations omitted) . . . The court has viewed all of these materials and is confident that the descriptive language fails to convey the impact of the visual image." Yet, the court clearly indicated the types of descriptions that would have been sufficient absent "validating" mass public exhibitions. (See Respondent's Statement of the Case for examples.)

The holdings in ***Anderson*** and ***Pryba*** merely indicate that surveys must use appropriate methodology and characterizations which adequately describe in sufficient detail the actual nature of the materials at issue in the prosecution. Thus, Cinema Blue's assertion that they would be unable to offer expert testimony without an injunction immunizing public exhibitions is absolutely false, particularly when weighed against Gilchrist's assertion to the state court that, "I think they can certainly provide this material to their expert witness." (4th Cir. J.A. 25-a)

B.

THE "DETERRENT EFFECT" OF VALID CRIMINAL LAWS DOES NOT CONSTITUTE BAD FAITH OR HARASSMENT, THE REQUISITES FOR WHICH ARE CLEAR AND NOT EVEN REMOTELY PRESENT IN THE INSTANT CASE.

With Gilchrist's consent to provide the materials to the defense as a backdrop, Cinema Blue's comparison of legitimate apprehension of prosecution to bad faith harassment or to prior restraint through wholesale seizures of every copy of a particular book are entirely specious. If this comparison held even a scintilla of validity, then no obscenity law, nor even a libel law, could stand for fear of prosecution deterring the dissemination of presumptively protected materials.

Cinema Blue complains that Gilchrist's conduct deprives them of their First Amendment right to freedom of speech. The District Court did not even address this issue, except to say that Cinema Blue "failed to address this claim in their brief in support of the motion for preliminary injunction and at the hearing; therefore, the court does not decide that issue." (Pet. App. 12)

Finally, the requisites for bad faith and harassment are abundantly clear from this court's own decisions. Again, in ***Perez v. Ledesma***, 401 U.S. 82, 85 (1971), the Court indicated that ". . . [O]nly in cases

of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction...is federal...relief against pending state prosecutions appropriate." See e.g., ***Kuqler v. Helfant,*** 421 U.S. 117, 126, n. 6 (1975), "'Bad faith' in this context generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." No such finding has been made by the courts below, and no evidence was presented at the preliminary hearing to support any such allegation.

## CONCLUSION

For all of the foregoing reasons, Respondents respectfully urge this Court to DENY Petitioners' request for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

This the 1st day of March, 1990.

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